

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Stoer Construction Incorporated,

No. CV-22-00400-PHX-SMB

10 Plaintiff,

ORDER

11 v.

12 Benson Security Systems Incorporated, et
13 al.,

14 Defendants.

15 Pending before the Court are two of Plaintiff Stoer Construction, Inc.’s (“Stoer”) Motions. Stoer filed a Motion to Dismiss and/or Strike Defendants Benson Security Systems, Inc. (“Benson Security”), Shawn Benson, Eric Benson, and Cory Benson’s (collectively “Defendants”) Amended Counter Complaint (“Counter Complaint”). (Doc. 95.) Defendants filed a Response (Doc. 98), and Stoer filed a Reply (Doc. 99). Stoer also filed a Motion to Strike Defendants’ Amended Counter Complaint Pursuant to California Code of Civil Procedure Section 425.16. (Doc. 102.) Defendants filed a Response (Doc. 109), and Stoer filed a Reply (Doc. 112). The Court heard oral argument on August 16, 2023. After considering the parties’ arguments and the relevant law, the Court will deny the Motions for the following reasons.

25 **I. BACKGROUND**

26 This case involves a contract dispute between a general contractor and its
27 subcontractor. Stoer filed its First Amended Complaint in September 2022, raising many
28 claims from Defendants’ alleged failure to perform under six subcontracts. (Doc. 64 at 11,

1 19–44.) Stoer’s First Amended Complaint alleged that Defendants misrepresented that
2 Benson Security had a valid California contractor’s license and that Eric and Cory Benson
3 lacked sufficient experience to supervise a construction project of this magnitude. (Doc.
4 72 at 4.) In April 2023, Defendants filed its Amended Answer, Affirmative Defenses,
5 Counterclaims, and Third-Party Complaint (“Counter Complaint”) against Stoer, Stoer’s
6 Chief Executive Officer Sean Anderson, Stoer’s Chief Operating Officer Mike Ward, and
7 BC Holding, LLC (“BC Holding”). (Doc. 90 at 30, 53.)

8 The Court sets forth the Counter Complaint’s allegations as follows. Since 2010,
9 Benson Security has held a California’s contractor license and funnels California jobs
10 through its San Diego office. (*Id.* at 31–33.) In December 2017, Benson Security met with
11 Stoer via Anderson and Ward. (*Id.* at 34.) Anderson and Ward proposed that Benson
12 Security and Stoer enter into a joint venture to bid on construction projects that became
13 Benson NorCal. (*Id.* at 35.) Benson Security’s Vice-President Philip Farber, Benson
14 Security, and BC Holding executed an operating agreement for Benson NorCal with the
15 following profit split: Benson Security (47.5%); BC Holding (45.5%); and Farber (7%).
16 (*Id.* at 37.) In March 2018, Anderson, Ward, and Stoer created a separate entity (BC
17 Holding) by filing articles of organization in California. (*Id.* at 36.) BC Holding
18 represented that it would capitalize Benson NorCal with \$200,000. (*Id.* at 38.)

19 Anderson and Ward, on behalf of BC Holding and Stoer, approached Benson
20 Security about using Benson NorCal to bid for subcontracts on a large hotel construction
21 project (“Element Project”) to which Stoer was awarded the general contract. (*Id.* at 36–
22 37.) Up for grabs were six subcontracts on the Element Project to complete work for
23 plumbing, heating, ventilation, and air condition (“HVAC”), fire sprinkler, fire alarm, low
24 voltage data communications, and electrical systems. (*Id.* at 37.) While the parties
25 negotiated the six subcontracts, Anderson requested—to Benson Security’s surprise—that
26 Benson Security and/or Benson NorCal secure bonding for the project. (*Id.* at 38.) From
27 October 8, 2018 through October 17, 2018, Stoer offered all six subcontracts to Benson
28 NorCal. (*Id.* at 39–41.) Each subcontract paid the following amounts: plumbing (\$2.5

1 million); HVAC (\$2.1 million); fire sprinkler (\$300,000); fire alarm (\$200,00); low voltage
2 (\$200,000); and electrical (\$2.95 million). (*Id.*) Because Benson NorCal had not yet
3 obtained a California contractor's license, the parties wrote Benson Security's contractor's
4 license number on the subcontracts. (*Id.* at 41.) Benson Security was later notified that it
5 could not obtain a contractor's license or bonding unless it inactivated own license. (*Id.* at
6 41–42.) Due to separate contract obligations, Benson Security was unable/unwilling to
7 inactivate its license but Stoer, through Anderson and Ward agreed that Benson Security
8 would fulfill the subcontracts. (*Id.* at 42.)

9 The parties agreed to replace Benson NorCal with Benson Security on the
10 subcontracts. (*Id.* at 42.) The invoices and checks (except one) the parties issued or paid
11 were addressed to Benson Security. (*Id.* at 42–44.) On July 26, 2019, Stoer extended new
12 offers for the six subcontracts with only one material difference—they listed Benson
13 Security in Benson NorCal's place. (*Id.* at 48.) Eric Benson signed those new subcontracts
14 on Benson Security's behalf. (*Id.*) Benson Security began work on the Element Project in
15 September 2019 and continued that work through October 2020. (*Id.* at 49.) Benson
16 Security issued Stoer invoices totaling about \$7.2 million of which Stoer had paid about
17 \$5.9 million. (*Id.* at 50.) Due to the discrepancy in the invoice amount and monies Stoer
18 actually paid, Benson Security contributed \$2.5 million of its own money to ensure the
19 Element Project's continued progress. (*Id.*)

20 Stoer's last payment to Benson Security was made on July 24, 2020, and that
21 payment represented only a portion of invoices from March 2020 on the fire alarm and
22 plumbing subcontracts. (*Id.* at 52.) Benson Security's last received payments on the
23 HVAC, electrical, and low voltage subcontracts in May 2020. (*Id.*) Benson Security asked
24 Stoer about the disruption in paid invoices, and Anderson and Ward provided assurance
25 that the payments would be made in due time and insisted that Benson Security's work on
26 the Element Project continue. (*Id.*) Benson Security never received payments for \$1.3
27 million's worth of work and materials. (*Id.*)

28 As the Element Project remained underway, Stoer requested that Benson Security

1 hire nineteen more electricians. (*Id.* at 53.) Benson Security obliged, but Anderson refused
 2 access for the new electricians to perform any work. (*Id.*) On July 27, 2020, Stoer
 3 terminated the low voltage, electrical, and fire alarm subcontracts. (*Id.*) Shawn Benson
 4 and Phil Farber traveled to the jobsite on October 28, 2020, to meet with Stoer through
 5 Ward and Phil Varni. (*Id.*) Ward then told Benson Security that Stoer had no intention of
 6 paying the outstanding invoices and that Stoer intended to replace Benson Security on the
 7 Element Project. (*Id.*) Ward made other comments such as “we were wondering when
 8 you were going to come out” and “how long you were going to work for free.” (*Id.*) Varni,
 9 on Stoer’s behalf, then terminated the HVAC, plumbing, and fire sprinkler subcontracts
 10 via email and demanded that Benson Security leave the jobsite within two hours. (*Id.* at
 11 53–54.) Stoer then initiated an arbitration action against Benson NorCal for disgorgement
 12 of money paid to Benson NorCal that was actually paid to Benson Security. (*Id.* at 54.) In
 13 February 2011, BC Holding sent Benson Security a letter withdrawing BC Holding from
 14 its membership in Benson NorCal. (*Id.* at 54.) Benson NorCal filed for bankruptcy in June
 15 2021, and this litigation began shortly thereafter. (*Id.*)

16 The Counter Complaint sets forth twelve claims for: breach of the “new”
 17 subcontracts that substituted Benson NorCal with Benson Security; promissory estoppel;
 18 unjust enrichment quantum meruit/breach of implied contract in fact; breach of the implied
 19 covenant of good faith and fair dealing (for the new subcontracts); declaratory judgment;
 20 breach of the Benson NorCal operating agreement; another claim for promissory estoppel;
 21 breach of fiduciary duty; fraud; and conspiracy to induce breach of the new subcontracts
 22 and commit fraud. (*Id.* at 55, 58, 60–62, 67, 69–70, 73.) Stoer now moves to dismiss the
 23 Counter Complaint under Rules of Civil Procedure 12(b)(6), 8(a), and 9(b). Stoer also
 24 moves to strike the Counter Complaint under California’s Anti-strategic lawsuits against
 25 public participation (“Anti-SLAPP”) statute.

26 II. LEGAL STANDARD

27 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet
 28 the requirements of Rule 8(a)(2). Rule 8(a)(2) requires “a short and plain statement of the

claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss if it contains sufficient factual matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Facial plausibility exists if the pleader sets forth “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Plausibility does not equal “probability,” but requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

Similar to the Court’s prior ruling, Rule 9(b) governs the review of Defendants’ fraud claims. (*See* Doc. 63 at 9.) Rule 9(b) requires parties alleging fraud to “state with particularity the circumstances constituting fraud.” This particularity requires ordinary factual allegations to be “accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citation omitted).

III. DISCUSSION

A. Rule 12(b)(6) Arguments

Stoer asserts Defendants’ claims should be dismissed because they are insufficiently or improperly pled. (Doc. 95 at 2–3.) The Court will address each of Stoer’s arguments in turn.

1 1. Alter Ego

2 Stoer contends the Counter Complaint’s alter ego allegations contain only
3 threadbare recitations and conclusory statements of the elements. (Doc. 95 at 5.)
4 Specifically, Stoer criticizes the first element—unity of interest—because the Counter
5 Complaint does not allege that Stoer has any ownership interest in BC Holding or vice-
6 versa. (*Id.* at 5–6.) Instead, the Counter Complaint alleges that Sean Anderson and
7 Michael Ward entirely owned BC Holding. (*Id.* at 6.)

8 While the application of Rule 9(b)’s heightened pleading standard to alter ego
9 liability is unsettled in the Ninth Circuit, a majority of courts within the Ninth Circuit have
10 required plaintiffs to allege the elements of alter ego liability “*as well as facts supporting*
11 *each.*” *Wimbledon Fund, SPC v. Graybox, LLC*, CV15-6633-CAS(AJWx), 2016 WL
12 7444709, at *5 (C.D. Cal. Aug. 31, 2016) (quoting *Neilson*, 290 F. Supp. 2d at 1116)
13 (emphasis added); *see also Walsh v. Kindred Healthcare*, 798 F. Supp. 2d 1073, 1082 (N.D.
14 Cal. 2011) (applying Rule 9(b) to the plaintiff’s alter ego allegations). The Court will apply

15 Rule 9(b)’s pleading requirements to Defendants’ alter ego allegations. Furthermore,

16 To satisfy the alter ego exception to the general rule that a subsidiary and the
17 parent are separate entities, the plaintiff must make out a prima facie case (1)
18 that there is such unity of interest and ownership that the separate
personalities [of the two entities] no longer exist and (2) that failure to
disregard [their separate identities] would result in fraud or injustice.

19 *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134–35 (9th
20 Cir. 2003) (cleaned up). The plaintiff must therefore show that the parent’s control over
21 the subsidiary renders the subsidiary the parent’s mere instrumentality. *Id.* at 1135. When
22 determining whether a unity of interest exists under California law, courts consider
23 multiple factors, including:

24 the commingling of funds and other assets of the entities, the holding out by
25 one entity that it is liable for the debts of the other, identical equitable
26 ownership of the entities, use of the same offices and employees, use of one
27 as a mere shell or conduit for the affairs of the other, inadequate
capitalization, disregard of corporate formalities, lack of segregation of
corporate records, and identical directors and officers.

28 *Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 954 (N.D. Cal. 2015)

1 (quoting *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1040 (N.D. Cal. 2014)).

2 Many of Defendants’ allegations setting forth unity of interest are conclusory factual
3 assertions and legal conclusions. Defendants assert, without more, that Stoer, Anderson,
4 Ward, and BC Holding commingled funds and other assets and that BC Holding is
5 undercapitalized. (Doc. 90 at 32 ¶ 245, 33 ¶ 247.) Defendants also assert that Stoer,
6 Anderson, and Ward caused BC Holding to disregard corporate formalities including
7 failing to segregate corporate records. (*Id.* 32 ¶ 244.) But Defendants’ other allegations
8 are sufficient to comply with Rule 9(b). Defendants allege Anderson and Ward own 100%
9 of Stoer and 100% of BC Holding. (*Id.* at 38 ¶ 267.) And that as the principals of Stoer,
10 Anderson and Ward used BC Holding as a shell company to shield them and Stoer from
11 liability. (*Id.* at 33 ¶ 250.) Thus, Defendants adequately allege that Stoer and BC Holding
12 have identical equitable ownership and are operated by identical directors and officers. (*Id.*
13 at 32 ¶ 240, 33 ¶ 250.) They further allege that Anderson and Ward, acting through Stoer,
14 were responsible for day-to-day management of BC Holding including approving contracts
15 and bill payments. (*Id.* at 32 ¶ 243.) Anderson and Ward’s management of both entities
16 allegedly occurred in the same offices that shared legal, human resources, payroll,
17 accounting, collections, etc. to the entities’ benefit. (*Id.* ¶ 242.)

18 After considering the factual allegations and weighing the relevant factors, the Court
19 finds the Counter Complaint sufficiently alleges a unity of interest and ownership. The
20 Court also finds the second alter ego element is sufficiently pled because if BC Holding
21 and Stoer are treated as separate, Defendants would be left with no recourse for its alleged
22 damages because BC Holding would have insufficient funds to pay for its alleged
23 misconduct—a result the Court finds inequitable.

24 Stoer also contends Benson Security lacks standing to maintain alter ego claims on
25 behalf of Benson NorCal, which Stoer alleges is Benson Security’s alter ego. (Doc. 95 at
26 6–7.) Citing *U.S. v. Kim*, 806 F.3d 1161, 1168 (9th Cir. 2015), Stoer chalks Defendants’
27 allegations up to “reverse-piercing” the corporate veil, which California courts have
28 rejected. (*Id.*) The Court disagrees that “reverse-piercing” is at issue here. Defendants

1 allege in great detail the licensing and bonding difficulties Benson NorCal had related to
 2 the Element Project. Defendants allege the parties reworked the subcontracts to substitute
 3 Benson Security, who had a valid California contractor's license, into newly executed
 4 subcontracts. Defendants have clearly articulated Benson Security's seeking relief from
 5 Stoer, Anderson, Ward, and BC Holding's alleged breach of contract and fraud
 6 independent from the subcontracts entered by Benson NorCal. The Court will therefore
 7 deny Stoer's Motion to the extent Defendants failed to state a claim under the alter ego
 8 theory.

9 2. Contract Claims

10 The Counter Complaint raises many claims rooted in Stoer's alleged termination of
 11 its subcontracts with Benson Security. Stoer argues all Defendants' contract claims are
 12 defective because they cannot establish the existence of a valid contract in the absence of
 13 a signed agreement. (Doc. 95 at 8.) Stoer further argues that the only binding subcontracts
 14 were between Stoer and Benson NorCal. (*Id.* at 9.) Defendants cite *Energy Monster, Inc.*
 15 *v. Monster Energy Co.* to respond that California law does not require express signatures
 16 for a contract to be enforceable. No. EDCV 20-2528 JGB (SPx), 2022 WL 3137729, at *4
 17 (C.D. Cal. May 19, 2022). While "an express signature . . . may be one indicator of the
 18 parties' intent, . . . a court must look to the totality of evidence, including the words used
 19 in the agreement, as well as extrinsic evidence." *Id.* (cleaned up). Under California law,
 20 "an enforceable contract exists if there is a 'meeting of the minds upon the material terms
 21 of the contract.'" *Id.* (quoting *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100, 1122 (C.D.
 22 Cal. 2002)). The Court agrees that even in the absence of Defendants' alleging signed
 23 agreements, Defendants have alleged sufficient facts to maintain breach of contract claims.
 24 The Counter Complaint provides in great detail the circumstances surrounding the parties'
 25 alleged substitution of Benson NorCal with Benson Security on the six subcontracts.

26 Stoer cites *Fontenot v. Wells Fargo Bank, N.A.*, 129 Cal. Rptr. 3d 467, 483 (Cal. Ct.
 27 App. 2011) for the proposition that promissory estoppel claims cannot be claimed when
 28 the plaintiff alleges a "promise was given in return for proper consideration." (Doc. 95 at

9.) Stoer asserts Defendants' promissory estoppel claim is defective because it incorporates allegations that the parties had an express contract. (*Id.*) Citing *Hedging Concepts, Inc. v. First All. Mortg. Co.*, 49 Cal. Rptr. 2d 191, 197 (Cal. Ct. App. 1996), Stoer contends Defendants' quantum meruit/breach of implied contract in fact suffers a similar fate because the allegation of an actual agreement undermines the claim. (Doc. 95 at 9.) Acknowledging that Stoer disputes the validity and enforceability of the six alleged subcontracts with Benson Security, Defendants pled claims for promissory estoppel, unjust enrichment, and quantum meruit in the alternative. (Doc. 98 at 15.) The Court agrees that courts have long permitted similar alternative claims to survive dismissal. *See SOAProjects, Inc. v. SCM Microsystems, Inc.*, 10-CV-01773-LHK, 2010 WL 5069832, at *9 (N.D. Cal. Dec. 7, 2010) (denying motion to dismiss promissory estoppel claim based on the same allegations as a breach of contract claim); *see also Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, No. 12-04000 SC, 2013 WL 4353550, at *9-10 (N.D. Cal. Aug. 13, 2013) (denying motion to dismiss unjust enrichment and quantum meruit claims that mirror the promises underlying the relevant contract claims). Given that Stoer challenges only Defendants' ability to raise these alternative claims, and not the substance of the Counter Complaint's allegations related to those claims, the Court will deny Stoer's Motion as to the alternative contract claims.

Attacking Defendants' breach of the implied covenant of good faith claim, Stoer argues the claim is defective because the Counter Complaint does not describe conduct besides the alleged breach of Stoer's contractual duties. (Doc. 95 at 9.) Although Stoer is correct that Defendants must allege "something beyond breach of the contractual duty itself," *see Careau & Co. v. Security P. Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1393 (Ct. App. Cal. 1990), the Court disagrees that the Counter Complaint's allegations are insufficient. Beyond merely alleging that Stoer breached the subcontracts, the Counter Complaint specifies that Benson Security raised questions about unpaid invoices, which Stoer quelled with assurances that the bills would be paid, and the work should continue. And that Ward later communicated Stoer's intent to never pay Benson Security for the

1 work it completed on the Element Project. These allegations suffice to “demonstrate[] a
2 failure or refusal to discharge contractual responsibilities . . . by a conscious and deliberate
3 act . . . thereby depriving [the] party of the benefits of the agreement.” *Id.* at 1395.

4 Stoer argues because Benson Security was not a party to the subcontracts, the
5 Defendants lack privity and standing to assert affirmative claims. (Doc. 95 at 10.) Stoer’s
6 argument fails. As the Court noted above, the Counter Complaint alleges Stoer entered
7 into new subcontracts with Benson Security. Benson Security is entitled to seek relief
8 under agreements it alleges to have had with Stoer.

9 3. Fraud Claims

10 The Counter Complaint alleges Stoer, Anderson, and Ward made many
11 misrepresentations about whether Stoer would split profits with Defendants, pay
12 Defendants for work completed on the Element Project, and whether Stoer would fund
13 Benson NorCal. (Doc. 90 at 70–71.) Stoer asserts Defendants’ fraud claims lack
14 specificity because the Counter Complaint impermissibly groups the alleged conduct of
15 Stoer, BC Holding, Anderson, and Ward together. (Doc. 95 at 11.) The Court disagrees.
16 While the Counter Complaint does at time attribute conduct to Stoer, BC Holding,
17 Anderson, and Ward, the Court notes that the allegations as a whole are sufficiently
18 specific. The Counter Complaint alleges Anderson and Ward directed both Stoer and BC
19 Holding’s decision making relevant to the Element Project and the subcontracts. Anderson
20 and Ward together approached Benson Security about creating and using Benson NorCal
21 to bid for the Element Project’s subcontracts. Anderson then communicated Stoer’s
22 demand that Benson NorCal obtain bonds. When Benson NorCal was unable to receive a
23 California contractor’s license, Anderson and Ward agreed that Benson Security would
24 fulfill the subcontracts.

25 While Benson Security’s work continued on the Element Project, Stoer’s payment
26 of invoices became less consistent. Benson Security asked Stoer about those invoices, and
27 Anderson and Ward represented the invoices would be paid and insisted Benson Security’s
28 work continued. After Benson Security made significant progress, and Stoer quit paying

1 its invoices, Ward communicated that Stoer never intended to pay Benson Security for its
 2 work and wondered how long it would work for free. Stoer then terminated the
 3 subcontracts. Weighing the fraud allegations as a whole, the Court finds the Counter
 4 Complaint satisfies the heightened pleading requirements under Rule (9).

5 4. Unjust Enrichment, Declaratory Judgment, and Conspiracy Claims

6 Stoer argues these claims should be dismissed because they are not independent
 7 causes of action under California law. (Doc. 95 at 12.) “California does not recognize
 8 unjust enrichment as a claim for relief, [but] federal courts have declined dismissal of such
 9 a claim for relief on the basis that it may constitute a plausible claim for quasi contractual
 10 relief.” *Indian Hills Holdings, LLC v. Frye*, 337 F.R.D. 293, 304 (S.D. Cal. 2020) (cleaned
 11 up); *see also Astiana v. Hain Celestial Grp., Inc.*, 78 F.3d 753, 762 (9th Cir. 2015) (the
 12 Ninth Circuit reversed the district court’s dismissal of the plaintiff’s unjust enrichment
 13 claim and treating such claim as one under a quasi-contract). The Court will similarly opt
 14 not to dismiss Defendants’ unjust enrichment claim.

15 The Counter Complaint seeks declaratory relief under 28 U.S.C. § 2201 and
 16 California Civil Code Section 1060. (Doc. 90 at 66 ¶ 421.) A declaration is sought that
 17 Benson Security performed work on the Element Project pursuant to the six subcontracts.
 18 (*Id.*) To avail themselves of § 2201, claimants “must show a justiciable controversy exists,
 19 and the controversy must be definite and concrete.” *N. Cnty. Commc’ns Corp. v. Verizon*
 20 *Global Networks, Inc.*, 685 F. Supp. 2d 1112 (S.D. Cal. 2010). Whether Stoer and Benson
 21 Security entered into new subcontracts that guided Benson Security’s performance
 22 represents a justiciable controversy that affects the legal rights of the parties. The Court
 23 will therefore deny Stoer’s Motion as to the declaratory judgment claim.

24 The parties cite *Applied Equip. Corp. v. Litton Saudi Arabia*, 869 P.2d 454 (Cal.
 25 1994) to reach opposite conclusions as to whether Defendants can bring their conspiracy
 26 claim against Stoer, BC Holding, Anderson, and Ward. (Docs. 95 at 12; 98 at 21.)
 27 “Standing alone, a conspiracy does no harm and engenders no tort liability. It must be
 28 activated by the commission of an actual tort.” *Applied Equip.*, 869 P.2d at 511. A

1 claimant must therefore allege an underlying tort to “give rise to a cause of action.” *Id.*
2 Defendants have done so here. The Counter Complaint alleges Stoer, BC Holding,
3 Anderson, and Ward conspired to defraud Defendants of any benefits owed to them under
4 the subcontracts. (Doc. 90 at 73.) This alleged fraud led to Defendants’ alleged damages,
5 which include payments for work Benson Security completed on the Element Project. The
6 Counter Complaint does not allege conspiracy as a standalone offense, rather it describes
7 a civil conspiracy underlying an actionable tort claim. The Court will thus deny Stoer’s
8 Motion as to the conspiracy claim.

9 5. Damages

10 First, Stoer contends Defendants failed to generally allege damages. (Doc. 95 at
11 12–13.) The Counter Complaint alleges that Benson Security delivered invoices to Stoer
12 totaling \$7.2 million to which Stoer paid \$5.9 million. (Doc. 90 at 50.) The Counter
13 Complaint continues, alleging that Benson Security was forced to contribute its own \$2.5
14 million to ensure the Element Project’s continued progress. (*Id.*) Benson Security is
15 allegedly owed \$1.3 million in unpaid invoices. (*Id.* at 52.) The Counter Complaint also
16 sets forth the value of each subcontract that Stoer allegedly breached. (*See id.* at 39–41.)
17 The Court disagrees that the Counter Complaint fails to set forth Defendants’ damages.

18 Second, Stoer contends the Counter Complaint contains no allegations that Stoer
19 acted with oppression, fraud, or malice as is required to support Defendants’ request for
20 punitive damages. (*Id.* at 13.) This contention ignores much of the factual basis underlying
21 Defendants’ claims. The Counter Complaint consistently alleges Stoer, BC Holding,
22 Anderson, and Ward fraudulently induced Benson Security into performing subcontracting
23 work with no intention of completely paying for that work. While the Court recognizes
24 that California law does not permit punitive damages for breaches of contract, Defendants
25 have included sufficient allegations in the Counter Complaint to pursue punitive damages
26 on non-contract claims. *Tibbs v. Great Am. Ins. Co.*, 755 F.2d 1370, 1375 (9th Cir. 1985)
27 (“Under California law, punitive damages are not available for breaches of contract no
28 matter how gross or willful.”).

1 6. Rule 8(a)

2 Stoer argues the Counter Complaint is defective under Rule 8(a) because
 3 Defendants attached fourteen exhibits that include thirty-eight separate documents. (Doc.
 4 95 at 13.) Stoer mischaracterizes the length of the Counter Complaint, which Stoer asserts
 5 is “hundreds of pages long.” (*Id.*) As described in Defendants’ Response, the Counter
 6 Complaint devotes twenty-eight pages to Defendants’ Answer to the First Amended
 7 Complaint and another forty-four pages raising counterclaims. (Doc. 98 at 22–23.) The
 8 Court simply does not find the Counter Complaint to be “needlessly long . . . highly
 9 repetitious, or confused, or consist[ing] of incomprehensible rambling.” (Doc. 95 at 13)
 10 (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1217 (3d
 11 2010)).

12 Stoer also disagrees with the Counter Complaint’s use of a “misleading and
 13 confusing diagrams, documents, and exhibits” that do not follow the short and plain
 14 pleading requirements from Rule 8. (*Id.* at 14.) In specific contention is the diagram’s
 15 showing that Anderson and Ward are 100% owners of Benson NorCal. (*Id.*) The Court
 16 does not find the diagram confusing, let alone confusing enough to warrant dismissal. As
 17 is obvious on the face of the Counter Complaint, Defendants allege Anderson and Ward
 18 own 100% of BC Holding, which held a 45.5% interest in Benson NorCal.

19 Finding no basis to dismiss the Counter Complaint, the Court will deny Stoer’s
 20 Motion (Doc. 95).

21 **B. Anti-SLAPP**

22 Also before the Court is Stoer’s Motion to Strike under California’s statute that
 23 prohibits Strategic Lawsuits Against Public Participation (“Anti-SLAPP”). (Doc. 102.)
 24 Anti-SLAPP motions represent California’s solution to “a disturbing increase in lawsuits
 25 brought primarily to chill the valid exercise of the constitutional rights of freedom of
 26 speech and petition for the redress of grievances.” Cal. Civ. Proc. § 425.16(a). Causes of
 27 action “arising from any act . . . in furtherance of the person’s right of petition or free
 28 speech under the United States Constitution or the California Constitution in connection

1 with a public issue shall be subject to a special motion to strike.” Cal. Civ. Proc. §
 2 425.16(b)(1). Such a motion may generally be filed within 60 days of the service of the
 3 complaint unless a court otherwise deems a later filing to be proper. Cal. Civ. Proc. §
 4 425.16(f).

5 As a threshold issue, the parties dispute the applicable governing law. Defendants
 6 assert the Court has made no determination as to whether California law applies to this
 7 case, affecting whether Stoer can bring an Anti-SLAPP Motion. (Doc. 109 at 4 n.1.) Yet,
 8 Defendants cite California law at length in their Response to Stoer’s Motion to Dismiss to
 9 defend their claims. (See Doc. 98 at 9, 14, 20.) The Court notes Stoer first filed this case
 10 in California state court before Defendants removed it to federal court. (See Doc. 1.) The
 11 Case was later transferred to this District. (See Doc. 50.) California law is thus applicable,
 12 and the Court will consider Stoer’s Anti-SLAPP Motion. See *Van Dusen v. Barrack*, 376
 13 U.S. 612, 639 (1964) (“[Where the defendants seek transfer, the transferee district court
 14 must be obligated to apply the state law that would have been applied if there had been no
 15 change of venue.”).

16 Next the Court must determine the timeliness of Stoer’s Motion. The California
 17 Supreme Court has interpreted § 425.16(f) to require movants to file an Anti-SLAPP
 18 motion “within 60 days of service of the earliest complaint that contains that cause of
 19 action.” *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 413 P.3d
 20 650, 651 (Cal. 2018). Defendants argue Stoer’s filing is untimely because it raised the
 21 operative issues in its original Answer to Amended Complaint and Third-Party Complaint
 22 filed on February 7, 2023 (Doc. 76). (Doc. 109 at 8.) Defendants further argue that all
 23 their claims were raised in the February 7 filing, and the Counter Complaint only changed
 24 with respect to four voluntarily withdrawn claims. (*Id.* at 8–9.) Stoer asserts its Anti-
 25 SLAPP Motion is timely because it was filed within 60 days of service of the operative
 26 complaint, the Counter Complaint. (Doc. 112 at 4.) Alternatively, Stoer asks this Court to
 27 consider the Motion even if it is untimely because no discovery has been conducted. (*Id.*
 28 at 5.)

1 The Court finds Stoer’s Anti-SLAPP Motion is untimely, as the causes of action
 2 were raised in the original Answer to Amended Complaint, and the window to file such a
 3 motion closed 60 days after it received service of that pleading. *See Newport Harbor*, 413
 4 P.3d at 651 (“[T]o permit late filing, a defendant *must* move to strike a cause of action
 5 within 60 days of service of the earliest complaint that contains that cause of action.”). In
 6 *Newport Harbor*, the California Supreme Court affirmed the California Court of Appeal’s
 7 rationale that permitting an “absolute right to file an anti-SLAPP motion to an amended
 8 complaint ‘would encourage gamesmanship that could defeat rather than advance that
 9 purpose.’” *Id.* at 654 (quoting *Newport Harbor Ventures, LLC v. Morris Cerullo World*
 10 *Evangelism*, 212 Cal. Rptr. 3d 216, 224 (Cal. Ct. App. 2016)). The California Supreme
 11 Court continued, interpreting § 425.16(f) “to permit an anti-SLAPP motion against an
 12 amended complaint *if it could not have been brought earlier*, but to prohibit belated
 13 motions that could have been brought earlier (subject to the trial court’s discretion to permit
 14 a late motion).” *Id.*

15 In the exercise of its discretion under § 425.16(f), the Court will consider Stoer’s
 16 belated motion. The parties met and conferred about deficiencies in Defendants’ original
 17 Answer, and that conference led Defendants to seek the court’s leave to withdraw four of
 18 its claims. (*See* Doc. 112 at 5.) The Court is persuaded by Stoer’s argument that this case
 19 is in the earliest stages of discovery, so unlike *Newport Harbor*, the timing of Stoer’s filing
 20 still promotes a swift and early resolution. The Court also notes that neither party raised
 21 the timeliness of Stoer’s motion during oral argument. The Court will therefore turn to the
 22 Motion’s merits.

23 Stoer argues the Defendants’ claims arise out of Stoer’s protected activity of filing
 24 the arbitration proceedings and litigation. (Doc. 102 at 6.) Section 425.16(e) defines a
 25 protected activity to include:

26 (1) any written or oral statement or writing made before a legislative,
 27 executive, or judicial proceeding, or any other official proceeding authorized
 28 by law, (2) any written or oral statement or writing made in connection with
 an issue under consideration or review by a legislative, executive, or judicial
 body, or any other official proceeding authorized by law, (3) any written or

1 oral statement or writing made in a place open to the public or a public forum
2 in connection with an issue of public interest, or (4) any other conduct in
3 furtherance of the exercise of the constitutional right of petition or the
4 constitutional right of free speech in connection with a public issue or an
5 issue of public interest.

6 Cal. Civ. Proc. § 425.16(e). If the Court finds that Stoer has met its initial burden, the
7 burden shifts to Defendants “to demonstrate a reasonable probability of prevailing on the
8 merits of his cause of action.” *Trapp v. Naiman*, 159 Cal. Rptr. 3d 462, 466 (Cal. App.
9 2013). Stoer argues its seeking disgorgement in the underlying arbitration proceeding and
10 this litigation is the type of protected activity contemplated by the Anti-SLAPP statute.
11 (Doc. 102 at 8.) Stoer cites many of the Counter Complaint’s alleged facts to argue the
12 Defendants’ claims were in direct response to Stoer’s claims about Benson NorCal not
13 having a California contractor’s license. (*See id.* at 9–11.)

14 Defendants counter that the Counter Complaint does not rely on Stoer’s filing legal
15 proceedings, but rather its allegations that it performed work under the new subcontracts
16 to which Stoer failed to provide compensation. (Doc. 109 at 9–11.) Thus, Defendants
17 argue Stoer’s disgorgement claims are unrelated to the legal proceedings and its allegations
18 are based on Stoer’s pre-litigation statements and conduct. (*Id.* at 11–12.)

19 The Court disagrees that Defendants’ claims arose out of a protected activity. As
20 set forth above, the Counter Complaint alleges that Stoer agreed to amend the six
21 subcontracts to substitute Benson Security as the subcontractor for those six areas of work.
22 The Counter Complaint also alleges that Benson Security inquired about Stoer’s disruption
23 in payments and that Ward made statements about Stoer’s intent to never pay Benson
24 Security for its work. Defendants allege it performed significant work at a multi-million-
25 dollar loss because Stoer refused to pay monies contemplated by the six new subcontracts.
26 These allegations are entirely independent of Stoer’s seeking disgorgement for unlicensed
27 work Benson NorCal allegedly completed. Ward’s statements and Benson Security’s
28 claims for breach of contract and fraud did not arise out of the arbitration proceedings or
this lawsuit. They arose out of an alleged breach of the parties’ amended agreements for
Benson Security to complete the subcontracting work originally slated for Benson NorCal,

1 after Benson NorCal was unable to obtain bonding or licensure. Stoer therefore fails to
2 establish the first critical component, which means the Court need not consider the
3 subsequent components of the Anti-SLAPP analysis.

4 **IV. CONCLUSION**

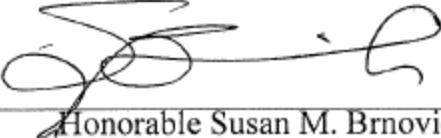
5 Accordingly,

6 **IT IS ORDERED** denying Stoer's Motion to Dismiss and/or Strike Defendants
7 Benson Security Systems, Inc., Shawn Benson, Eric Benson, and Cory Benson's Amended
8 Counter Complaint. (Doc. 95.)

9 **IT IS ORDERED** denying Stoer's Motion to Strike Defendants' Amended Counter
10 Complaint Pursuant to California Code of Civil Procedure Section 425.16. (Doc. 102.)

11 Dated this 17th day of August, 2023.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Honorable Susan M. Brnovich
United States District Judge